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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-149

SAMUEL G. ALLEN, II,
Petitioner,

—v—

BANKERS TRUST COMPANY and
BUDINGTON, ST. JOHN & PARK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL G. ALLEN, II
Petitioner, pro se
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BANKERS TRUST COMPANY and
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on May 3, 1971.

Jurisdiction

The judgment of the Court of Appeals was entered on May 3, 1971. A Petition for Rehearing En Banc was denied on June 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Questions Presented

1. Whether allegation of public injury or of a significant effect upon interstate commerce at large is prerequisite to maintaining a private action for treble damages under 15 U.S.C. §§ 1 and 15.

2. Whether the District Court erred in ruling a collateral estoppel by a decree of a Connecticut Court of Probate which, under the laws of its sovereign, has no jurisdiction to determine the issues in question.

Constitutional Provisions and Statutes Involved

I. *Constitution of the United States, Amendment VII*

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

II. *Sherman Act of 1890, Section 1 (15 U.S.C. § 1)*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy nor or hereafter in effect in any State, Territory, or the

District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914: *Provided further,* that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. *26 Stat. 209, amended 50 Stat. 693, 69 Stat. 282.*

III. *Clayton Act, Section 4 (15 U.S.C. § 15)*

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. *38 Stat. 731.*

Statement

Petitioner's father, Betram S. Allen, died a resident of Greenwich, Connecticut on August 24, 1961. His last will and testament, dated July 14, 1960, was admitted to probate in the Probate Court for the District of Greenwich on September 13, 1961. On September 18, 1961 petitioner's mother, Carolyn H. Allen, respondent Bankers Trust Company, and petitioner were appointed executors of said will and thereafter served in that capacity during all proceedings with respect to the Allen estate.

Although initially desirous of retaining co-counsel, respondent Bankers Trust Company acceded to the wishes of petitioner and his mother that the Allens' own attorney, Orson L. St. John of the respondent firm Budington, St. John & Park serve as attorney for all the executors. Petitioner and his mother had had a long professional relationship with Mr. St. John and had arrived at a favorable arrangement with him concerning his charges for services to the Allen estate (R. 3, p. 282; R. 5, Exhibit D). One of Mr. St. John's initial assignments on behalf of the Allens was to negotiate with Bankers Trust Company concerning its fee for services as managing co-executor of the Allen estate inasmuch as Bankers Trust Company appeared not to recognize, or to be unaware of, an ante-mortem agreement on that subject between Bankers Trust Company and the decedent, Bertram S. Allen (R. 5, Exhibit D). Instead of negotiating, representatives of Bankers Trust Company and the St. John firm conspired to defeat any prior agreements they may have had with the Allens and to fix their own fees for administering the Allen estate (R. 25 ¶ 7; R. 2, pp. 217, 218; R. 4, pp. 373 ff.). Having sole custody of the estate's assets, Bankers Trust Company was in a position to dictate terms (R. 25 ¶ 8).

On June 24, 1965 Bankers Trust Company presented its final account for the Allen estate to the Probate Court for

the Disrict of Greenwich for approval and filing Schedule "C" of the final account entitled "Statement Showing All Funeral and Administration Expenses and Estate Taxes Paid from Principal" showed, as items of expense, such fees to the respondents, Bankers Trust Company and Budington, St. John & Park, as they had agreed upon between themselves (R. 5, Exhibit B).

A hearing on the allowance of the final account was held at the Probate Court for the District of Greenwich on or about September 9, 1965. Petitioner and his mother appeared at said hearing and raised the question of their agreement with Mr. St. John. They were represented by counsel, who submitted a memorandum on their behalf urging that Bankers Trust Company be surcharged for fees in excess of those provided for in the agreement with the Allens (R. 5, Exhibit D). A memorandum in opposition was submitted by respondents Budington, St. John & Park on behalf of Bankers Trust Company wherein they stated:

> This is not a situation where there is disagreement between the attorneys and the executor of an estate as to the amount which should be paid. Under those circumstances the Probate Court would not be a proper forum in which to determine the amount of a claim which ought to be paid out of an estate (Section 52-202 of the General Statutes.) *** Under these circumstances the Bankers Trust Company has taken the proper courses in filing its accounting and seeking indemnity to which it is entitled subject to the proper exercise of discretion by the Court (Ballard v. Ballard, 13 Conn. Sup. 400, 402). In the exercise of this discretion the Probate Court is not required to act as a trial court. If it is satisfied that the Bankers Trust Company acted in good faith and according to its honest judgment, then Bankers Trust Company is

entitled to the credits requested in the accounting (Ballard v. Ballard, Ibid., 409).
R. 5, Exhibit C, p. 7

The Judge of Probate accepted the respondents' arguments and on December 15, 1965 ordered the said account accepted and filed without adjustment (R. 5, Exhibit E).

On April 6, 1966 respondent Bankers Trust Company paid the disputed amounts as shown in said final account to itself and to co-respondent Budington, St. John & Park and charged both amounts against the assets of the Bertram S. Allen estate.

On April 2, 1970, four days before the fourth anniversary of the payments alleged, petitioner Samuel G. Allen II brought an action in the United States District Court for the District of Connecticut charging that as a result of the conspiratorial agreement between respondents Bankers Trust Company and Budington, St. John & Park the fees charged against the Bertram S. Allen estate were larger than they otherwise would have been, and seeking treble recovery for the excess under the authority of the Sherman and Clayton Antitrust Acts, 15 U.S.C. §§ 1 and 15. Respondent Budington, St. John & Park moved to dismiss, contending that there was in the Complaint an insufficient allegation of an effect upon interstate commerce at large to state a claim upon which relief could be granted. Respondent Bankers Trust Company filed an answer and moved for summary judgment, contending, *inter alia,* that the petitioner is collaterally estopped from challenging the expense items by virtue of the fact that they had appeared on respondent's final account to the probate court, had been debated before that court, and had been accepted by it. On September 23, 1970 the District Court granted both motions and dismissed the Complaint. Judgment for the respondents was entered on September 24, 1970 and affirmed by the United States Court of Appeals for the Second Circuit on May 3, 1971.

Reasons for Granting the Writ

1. *The ruling of the lower courts conflicts with controlling decisions of this Court and also with a decision of the United States Court of Appeals for the Eighth Circuit.*

This Court has on several occasions reversed the dismissal of a private antitrust action for failure to allege an adverse effect upon the economy as a whole; *Radovitch* v. *National Football League,* 352 U.S. 445, 453 (1957); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961). In *In re McConnell;* 370 U.S. 230, 231 (1962) Mr. Jusice Black summarized the Court's guideline in such cases:

> *** we have held that the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public.

This guideline was followed by the Eighth Circuit in reversing the dismissal of a private antitrust suit in *Arthur Murray, Inc.* v. *Reserve Plan, Inc.,* 406 F.2d 1138 (8th Cir., 1969).

The petitioner seeks to recover damage resulting from a particular instance of the arbitrary fixing of fees for services. The fixing of fees for services is to be equated, under the Antitrust laws, with the fixing of the price of goods or commodities *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950), the latter having been defined as violative of the antitrust laws "per se." *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958).

The feature by which the lower courts distinguished the petitioner's case is its smallness of scale, the business

activities in question being of temporary duration and the ad damnum small. Statute, however, provides that such an action may be brought irrespective of the amount in controversy (15 U.S.C. § 15), and this Court has ruled that a plaintiff need allege only damage to his own interests. The business involved is "interstate commerce" because the defendants (respondents) are residents of different states and were conducting business in common. They had thus entered into the flow of interstate commerce even though they might deal in nothing more tangible than information *Gibbons* v. *Ogden*, 22 U.S. 1 (9 Wheaton, 1824) *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 128 (1937). Actionability is determined by the nature of the offense rather than by its extent *Klor's Inc.* v. *Broadway-Hale Stores, Inc., Cit. supra,* p. 213; *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 606 ff. (1939).

2. *The lower courts effectively abrogated the petitioner's right to trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.*

At least two circuits have upheld the parties' right to a jury trial in a private antitrust action seeking damages *Meeker* v. *Lehigh Valley R. Co.*, 162 F. 354 (2d Cir. 1908); *Siegfried* v. *Kansas City Star Co.*, 298 F.2d 1 (8th Cir., 1962), *cert. denied* 369 U.S. 819. The District Court effectively denied the right of trial by jury by ruling that the essential issues had been fully and conclusively adjudicated by a Connecticut Court of Probate—a court lacking the power to empanel a jury.

The petitioner does not claim that the Seventh Amendment grants a right of trial by jury where none previously existed but merely that it prohibits the Congress or the federal courts from denying that right when it exists under the common law. The petitioner has such a right.

Connecticut law recognizes that although the probate courts of that State may make provisional findings on matters outside their limited statutory jurisdiction, such findings are not conclusive and may be redetermined by a court of appropriate jurisdiction *Brownell* v. *Union & New Haven Trust Co.*, 143 Conn. 662, 124 A 2d 901 (1956); Locke & Kohn, *Connecticut Probate Practice* (1950) V. I, §§ 140, 141.

The petitioner's claim for damages is based on the existence, validity, and effect of two agreements: an ante-mortem agreement between decedent Bertram S. Allen and Bankers Trust Company, and a contract of employment between Carolyn and Samuel Allen and Mr. St. John arising incident to the administration of the Allen estate. The Connecticut probate courts have no jurisdiction to find, adjudicate, or construe either type of agreement *Hewitt's Appeal,* 53 Conn 24, 1 A 815 (1885); *Mallory's Appeal,* 62 Conn 218, 222, 25 A 109 (1892); *Havens' Appeal,* 69 Conn 684, 701, 38 A 795 (1897); *State ex rel. Moriarty* v. *Donahue,* 82 Conn 308, 73 A 763 (1909); *Schwartz* v. *Schwartz,* 104 Conn 271, 132 A 461 (1926); *Marks' Appeal,* 116 Conn 58, 163 A 600 (1932); *Lockett* v. *Doyle,* 148 Conn 639, 173 A 2d 507 (1961).

The respondents' activities constitute a breach of fiduciary duty. In Connecticut an action to recover damages for breach of fiduciary duty is an action at law, triable by a jury *Dettenborn* v. *Hartford National Bank & Trust Co.,* 121 Conn 388, 393, 185 A 82 (1936) but neither the probate court nor its appeal tribunal, the Superior Court, has the power to empanel a jury, *Ibid.* The petitioner did not institute the probate proceedings in question (R. 5, Exhibit B, p. 1), nor has he ever waived the right of trial by jury.

In arguing that the probate court would not be a proper forum to try dispute over the amount to be paid (*Statement, supra*), respondents Budington, St. John & Park were quite correct. Under Connecticut law the petitioner would be permitted to try this question in a court of law, and any provisional findings of the probate court on questions of contracts would not create an estoppel. By ruling that the probate findings on these matters were final, where the Connecticut courts would not have done so, the District Court effectively denied the petitioner the right to try the facts to a jury.

It is desirable that the Court rule upon the question of whether or not such action by a Federal District Court violates the provisions of the Seventh Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

July 30, 1971

SAMUEL G. ALLEN, II
Petitioner, pro se

APPENDIX A

Memorandum of Decision

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-44

SAMUEL G. ALLEN, II,

Plaintiff,

v.

BANKERS TRUST COMPANY and
BUDINGTON, ST. JOHN & PARK,

Defendants.

The plaintiff, an attorney and the residuary legatee of one of two trusts created by his deceased father, brings this antitrust action pro se against the executor and the attorneys of his late father's estate. In sum, the plaintiff alleges that the defendants have diminished the estate and the trusts created therein by excessive fees charged in the probate court proceedings. Faced with an adverse and unappealed ruling by the judge of the probate court on exactly the same point, the plaintiff now seeks to relitigate the issue in the federal court under the antitrust laws.

The material facts are not in dispute. Plaintiff's father, Bertram S. Allen, died a resident of Greenwich, Connecticut on August 24, 1961. His will was admitted to probate in the Probate Court for the District of Greenwich on September 13, 1961. On September 18, 1961, plaintiff's mother, Carolyn H. Allen, defendant Bankers Trust Company, and

plaintiff were appointed executors of the estate. At the request of plaintiff and his mother, defendant Bankers Trust Company retained the law firm of Budington, St. John and Park as the attorney for the executors of the estate. The defendant Bankers Trust has its principal place of business in New York City; the firm of Budington, St. John and Park is a partnership of practicing lawyers in Greenwich, Connecticut.

The will created a marital deduction trust in favor of plaintiff's mother, who was given a power of appointment over its corpus. Were this appointment not to be exercised and were plaintiff's mother to predecease him, the residuary estate was to pass to plaintiff. A second nonmarital trust was also created, which named plaintiff's mother a lifetime income beneficiary. The trustees were given discretionary power to invade the principal for the maintenance and support of plaintiff's mother. Upon her death, should she predecease plaintiff, the remaining corpus of the trust, if any, was to be paid to plaintiff. The plaintiff's mother is still living, and both trusts have been funded and are being administered.

On June 24, 1965, the final accounting with respect to the estate was filed in the Greenwich Probate Court. The account included fees to the executor Bankers Trust of $26,770.47, and to the defendant Budington, St. John and Park for legal services and disbursements of $18,217.30. A hearing on the allowance of the account was held before Probate Judge Burke on July 7, 1965. Plaintiff and his mother appeared wtih new counsel and opposed the allowance of attorneys' fees.

On December 15, 1965, Judge Burke after a hearing ordered the final account to be filed without change. He found that "on the basis of the nature and size of the

estate and customary fees in similar matters" the legal fees were reasonable. Although Connecticut law permits an aggrieved party to appeal an order on a final account, Conn. Gen. Stat. § 45-288, no review was sought by the plaintiff or his mother. On April 5, 1966, distribution according to the terms of the final account was made.

Almost four years later, on April 2, 1970, the plaintiff commenced this action charging that the defendants conspired, in violation of the antitrust laws, to secure for themselves fees in excess of the reasonable value of the services rendered in the administration of the estate. Paragraph 7 of the amended complaint reads in pertinent part that "the defendants, by representatives of each, did contract, combine or conspire to assist each other, then and thereafter, in the pursuit of mutual or reciprocal benefits, including the securing of fees for each or for the other in excess of the reasonable value of the services rendered therefor." Jurisdiction of this court is invoked under the provisions of Section 4 of the Clayton Act, 15 U.S.C. § 15, to recover treble damages due to an alleged violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

The defendant Budington, St. John and Park moves to dismiss on the ground that the complaint fails to state a claim upon which relief can be granted, Rule 12(b)(6), Fed. R. Civ. P.; the defendant Bankers Trust Company requests summary judgment, Rule 56, Fed. R. Civ. P.; claiming, *inter alia,* that the action is barred by the principles of collateral estoppel. Both motions are granted.

It seems clear that the plaintiff's action cannot lie since neither the complaint nor the moving papers indicate any facts tending to show that interstate commerce was in any way affected by defendants' acts. This is a fatal defect in plaintiff's case. 15 U.S.C. § 1. Even assuming the truth

of the allegation that the out-of-state executor and the in-state attorney for the estate agreed and conspired to charge excessive fees, any possible effect on interstate commerce is too remote and inconsequential to satisfy the requirements of the Sherman Act. See, e.g., *United States* v. *International Boxing Club,* 348 U.S. 236, 243 (1954); *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F.2d 341, 343 (9 Cir. 1960); *Lieberthal* v. *North Country Lanes, Inc.,* 332 F.2d 269, 272 (9 Cir. 1964); *Bookout* v. *Schine Chain Theatres,* 253 F.2d 292, 295 (2 Cir. 1958); *Stewart* v. *Hevelone,* 283 F. Supp. 842, 846 (D. Neb. 1968); *L. S. Good & Company* v. *H. Daroff & Sons, Inc.,* 279 F. Supp. 925, 927 (N.D. W. Va. 1968).

Additionally, it appears that the plaintiff is collaterally estopped from maintaining this action. Under the doctrine of collateral estoppel a judgment on the merits in a prior suit between the parties precludes the relitigation in a subsequent action of any issue actually litigated and determined in the prior suit. *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 326 (1955); see also James, Civil Procedure § 11.18 (1965).

The plaintiff seeks to avoid the application of the doctrine on the ground that the probate court lacked jurisdiction to decide his antitrust violation claim. As is evident from his brief on the point, the plaintiff has confused the principles applicable to a defense of *res judicata* with the rules governing collateral estoppel. In *Lawlor* v. *National Screen Service Corp., supra,* at 326, the distinction between the two doctrines was succinctly stated as follows:

> [U]nder the doctrine of *res judicata,* a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same

> cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

See also *Smith* v. *Alleghany Corporation*, 394 F.2d 381, 394-395 (2 Cir. 1968); *McNellis* v. *First Federal Sav. & L. Ass'n of Rochester, N.Y.*, 364 F.2d 251, 254 (2d Cir. 1966); *James L. Saphier Agency, Inc.* v. *Green*, 293 F.2d 769, 773 (2 Cir. 1961); *Carroll* v. *Associated Musicians of Greater N.Y., Local 802*, 235 F. Supp. 161, 174 (S.D.N.Y. 1963).

Here the question of the reasonableness of the fees charged in the Bertram S. Allen Estate was fully litigated and determined by Judge Burke. His order on the final account was not appealed, the fees of the executor and the attorney were paid pursuant to the order, and for over four years the trusts have been administered with the fund established by the final account. The fees issue should not now be reopened and relitigated.

Accordingly, the motion of defendant Budington, St. John and Park to dismiss is granted; the motion of defendant Bankers Trust Company for summary judgment is granted.

Dated at New Haven, Connecticut, this 21st day of September, 1970.

ROBERT C. ZAMPANO
United States District Judge

APPENDIX B

Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. B-44

SAMUEL G. ALLEN, II,

Plaintiff,

v.

BANKERS TRUST COMPANY and
BUDINGTON, ST. JOHN & PARK,

Defendants.

The Court having filed on September 23, 1970, its Memorandum of Decision granting the Motion of defendant Budington, St. John and Park to dismiss and granting the Motion of defendant Bankers Trust Company for summary judgment, it is

ORDERED and ADJUDGED that this action is dismissed on the merits and that defendants have heir costs.

Dated at Bridgeport, Connecticut, this 24th day of September, 1970.

GILBERT C. EARL, Clerk

By: THOMAS A. GRIMES
Chief Deputy Clerk

(SEAL OF THE COURT)